The Art of Admitting Exhibits into Evidence During Trial

By Linda M. Watson

There is a time to ad lib and a time to stick to the script. When it comes to admitting exhibits into evidence, it's better to have a script and stick to it. That means you must plan in advance and, like any good playwright, you may need a few drafts to refine your approach. This article provides advice for the attorney seeking to perfect the craft and obtain more predictable results in admitting exhibits at trial.

Trial attorneys are, among other things, storytellers of the highest calling. While providing some level of narration, they largely use testimony and exhibits to weave together a tale rich with detail and meaning on which fortunes and fates often rise and fall. During discovery, as your case progresses and you begin to determine the importance of exhibits to your prosecution or defense, you should ask yourself how you will admit exhibits into evidence at trial. Perhaps the answer will be simple, such as with a letter your adversary authored and signed. At the same time, you should consider the objections to evidence opposing counsel may raise, even if the evidence is likely to be admitted at trial. It may be that the document is not relevant and any nominal relevance is outweighed by harmful prejudice. Regardless of how simple the objection, a good attorney should have given thought to potential objections—even as to exhibits that do not raise any obvious objections—and be prepared to argue against the objections raised by opposing counsel.

A more complex situation may exist, for example, when you subpoena a third party for the production of documents, receive a document in response, and decide to use the exhibit at trial. Perhaps it's a photocopy of a cancelled check from the nonparty to the opposing party. You don't have a witness available to authenticate the check, but it's critical to telling your story and proving your case. Ask yourself, How do I get the cancelled check into evidence? On the other hand, if you don't want this exhibit to come into evidence, you need to ask yourself the opposite question. Regardless of which side of the evidentiary issue you are on, you need to immerse yourself into the applicable rules of evidence, court rules, statutory law, and caselaw to find the answers to these questions.

As to exhibits for which you anticipate an objection, the best advice is to be prepared for two things. First, prepare to lay a foundation for the exhibit, providing background and context to demonstrate relevance. Every exhibit must meet three basic requirements before it can be admitted into evidence: (1) the witness must be competent to testify about it,[1] (2) the testimony and exhibit must be relevant,[2] and (3) the exhibit must be authentic or fit within some exception.[3] Foundation can be made on direct or cross-examination of a witness. Once you lay a foundation with the proper witness for the exhibit, it is offered into evidence.

Second, prepare for objections to the exhibit, which tend to challenge foundation, relevancy, or authenticity. Keep in mind that the rules of evidence are designed to ensure that evidence on which a finder of fact relies is accurate and reliable. Judges enforce these rules. As a general practice, consider creating in advance of trial a brief pocket memorandum for each exhibit. The obvious exception to this practice would be exhibits to which the parties have stipulated to admitting. The pocket memorandum is your script and provides the grounds for admitting the exhibit and the arguments addressing potential objections. Preparing the pocket memorandum in advance will give you time to fully consider the likelihood of getting the exhibit admitted and allow you to refine your argument for the best chance at success. Arguments during trial regarding the admission of exhibits tend to move fast; if you are not prepared, you could find yourself having lost the admissibility issue before you have had a chance to expound at length. At a minimum, if you have prepared and put your position cogently on the record, you have likely properly preserved the record for appeal should you lose the argument on a particular exhibit.

Moreover, if you don't get an exhibit into evidence, try to use it for other purposes such as to refresh the memory of a witness, or to impeach with a prior inconsistent statement. If the witness's recollection is inaccurate, the exhibit might

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be used to impeach. While you may not get the full effect or use of the exhibit because it has not been admitted into evidence, at least the exhibit will play a role in the case.

Further, be careful of relying on the catch-all exception in the rules of evidence when dealing with hearsay objections. It is over-used and rarely applied—to the disappointment of many trial attorneys. More specifically, the rule requires: (1) the statement must be offered as evidence of a material fact, (2) the statement must be more probative than any other evidence on the point for which it is being offered, and (3) the interest of justice must be served by admission of the statement.[4] In addition, there needs to be disclosure well in advance of trial. This is a very stringent standard to meet.

A few examples of objections to anticipate may prove helpful. First, in a situation in which you are trying to admit duplicates of actual cancelled checks, opposing counsel may object as to authenticity. Consider using MRE 1003, which addresses the admissibility of duplicates. This rule provides that the duplicate is admissible to the same extent as the original unless there are legitimate issues raised regarding its authenticity. Second, you may encounter a situation in which you are dealing with numerous checks and want to admit a summary of the checks' information instead of each and every check, which would take days. You will receive an objection as to hearsay and authenticity unless you properly approach admission of the summary. The summary and the originals or duplicates forming the information in the summary must be produced in advance to opposing counsel.[5] Furthermore, you must have the witness who prepared the summary available to testify as to foundational information such as when, where, and how the chart was made. As a third example, perhaps you want to enter a copy of a property tax statement into evidence through the property owner. Opposing counsel may object on the basis of hearsay and authenticity. A well-prepared attorney will argue that the property tax statement falls squarely within the public records exception to the hearsay rule[6] and that public records satisfy the authentication requirement.[7]

Finally, some evidentiary issues will be addressed as motions in limine in advance of trial. Oftentimes, courts will deny and defer a ruling on these until the time of trial. If a motion is granted and exhibits are precluded, you may want to carefully consider the scope of the ruling and whether you should still offer exhibits at trial. It may be advantageous to offer the evidence in another context so that the previously excluded evidence might be admitted for another reason. Indeed, a motion in limine may actually prove helpful to the party seeking to admit an exhibit because it provides an opportunity to prepare an argument and see how the judge views the evidentiary issue. Alternatively, if the moving party had waited until trial to admit the evidence, the party may have benefited from the element of surprise.

In closing, preparation is the key to getting your exhibits admitted into evidence. When a good portion of your case is established through exhibits, don't overlook spending time on how the exhibits will be admitted into evidence and the objections that may be raised to their admission. The exhibits will not walk into the story by themselves, but will need a protagonist to champion them. You will need a good script that sets forth a foundation and anticipates objections. ■

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ENDNOTES

1. MRE 601.
2. MRE 402.
3. MRE 901 through MRE 902.
4. MRE 803(24).
5. MRE 1006.
6. MRE 803(8).
7. MRE 901(b)(7).